Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278 CC Docket No. 92-90
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	)	

REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.

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AT&T Wireless Services, Inc. ("AWS") hereby submits its reply comments in response to parties' opening comments on the Commission's *Notice of Proposed Rulemaking and Memorandum Opinion and Order* ("NPRM") issued in the above-encaptioned proceeding.

I. INTRODUCTION AND SUMMARY

The record developed in this proceeding supports implementation by the Commission of a single, centralized national do-not-call list and demonstrates that such a list will benefit consumers, telemarketers and carriers alike. In creating such a system, however, it is critical that the Commission balance the interest of consumers in protecting their privacy with their interest in receiving information from businesses of their choosing, including in particular those with which they enjoy an established business relationship ("EBR"). In parallel fashion, the Commission must protect the right of companies to communicate with customers that are interested in receiving information about the products and services offered by those companies.

The Commission must ensure that the do-not-call program it develops is user-friendly for consumers and telemarketers and constitutes an improvement over the current patchwork of overlapping programs that includes multiple state lists, voluntary industry protocols and the rules recently promulgated by the Federal Trade Commission ("FTC"). There is a significant risk that

if the Commission does not act decisively to create a comprehensive national do-not-call program, its efforts only will exacerbate the inefficiency and confusion in this area. Although the FTC has stated its support for a comprehensive national program to prevent telemarketing abuses, it has provided few details on how to achieve that goal.

AWS urges the Commission to take the lead in establishing regulatory certainty in this area. The Commission should recognize its unique jurisdiction, expertise and statutory authority and adopt regulations that further the goals of the Telephone Consumer Protection Act ("TCPA"). In these reply comments, AWS sets forth a number of specific suggestions for Commission action, some of which are based upon the FTC's telemarketing rules.

AWS urges the Commission to preempt state do-not-call lists or at a minimum mandate the establishment of a single, all-inclusive list of names upon which telemarketers may rely for compliance purposes. Because coordinating the interaction of state and federal programs will be complicated and has not been analyzed by the regulatory agencies or commenters, the Commission should solicit further comment on those issues.

AWS strongly believes that the Commission should extend do-not-call rights to wireless subscribers and maintain the existing regulations relating to telemarketing calls to wireless phones.

It is critical that the telemarketing rules the Commission adopts do not restrict carriers' ability to communicate with their existing customers. AWS believes that the EBR rules promulgated by the FTC strike an appropriate balance in this area.

Given the broad effect of a national do-not-call list, it also is critical that the telemarketing rules make it easy for customers to accept calls from businesses of their choosing. The FTC's written authorization process is overly restrictive; the Commission should adopt a

more flexible election process. Because they facilitate customer choice, AWS also continues to support maintenance of company-specific lists and companies' ability to contact customers on the national do-not-call list if the customer has provided CPNI "consent."

AWS believes that the FTC's requirement that companies maintain names on a company-specific do-not-call list for five years is excessive; customers should not be "locked in" to a do-not-call list for an unreasonably long time period. AWS believes that a shorter duration, three years for example, is sufficient.

Finally, AWS supports the FTC's rule implementing the safe harbor provision of the TCPA. However, AWS urges the Commission to extend this provision in the manner discussed below in order to allow companies to protect themselves from liability for unauthorized telemarketing of their products and services by third parties.

II. NATIONAL DO-NOT-CALL LIST

A. AWS Reiterates Its Support for a Single, Centralized National Do-Not-Call List

AWS continues to support implementation by the Commission of a single, centralized national do-not-call list. In doing so, AWS joins a wide array of commenters from government,[1] business[2] and the public interest sector[3] that strongly support the Commission's proposed national do-not-call list as a means of empowering consumers to protect themselves against unwanted telemarketing calls. Now that the FTC has determined that it will implement a do-not-

[1] *See, e.g.*, Attorneys General Comments at 4; New York State Consumer Protection Board Comments at 2; PUC of Ohio Comments at 2-7; PUC of Texas Comments at 4.

[2] *See, e.g.*, Verizon Comments at 7; AWS Comments at 2; Comcast Comments at 2; Intrado Comments at 5; NCS Pearson Comments at 6-7.

[3] *See, e.g.*, National Association of Consumer Agency Administrators Comments at 2; National Consumers League Comments at 7-8; Electric Privacy Information Center Comments at 2-3; Center for Democracy and Technology Comments at 1.

call list, AWS believes it is critical that the Commission coordinate with the FTC on a single unified federal list to minimize confusion and provide clear guidance.

Commenters offered a number of compelling arguments in support of implementation by the Commission of a national do-not-call list.[4] For example, the City of Chicago favors the Commission's implementation of a do-not-call list as a means of creating nationwide coverage, emphasizing that state-by-state do-not-call coverage has proven deficient:

> [C]ompany-by-company or state-by-state databases are incomplete in their coverage, are subject to easy avoidance or manipulation, and shift the burden of controlling industry behavior from the actors to consumers.[5]

Similarly, Verizon argues that "[a] national DNC list could . . . produce obvious benefits – a single set of rules that would apply to all consumers and all telemarketers" and "provide consumers with a one-step method for preventing telemarketing calls."[6]

Those commenters opposing a single, national centralized do-not-call list have not offered a compelling justification for their opposition and the denial of consumer benefits that would result. BellSouth, Cingular and certain other parties state that a national list is unnecessary because the record does not demonstrate that consumers receive unwanted telemarketing calls.[7] These parties argue that rather than creating another list as a means of preventing telemarketing abuse, the federal government should enforce existing rules more

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[4] *See, e.g.*, Intrado Comments at 5 (easier for consumers and telemarketers); PUC of Ohio Comments at 9-10 (helpful for states without databases); AWS Comments at 7-9 (greater protection for consumers at lower costs for telemarketers).

[5] City of Chicago Comments at 2.

[6] Verizon Comments at 7.

[7] *See* BellSouth Comments at 2 and Cingular Comments at 4. *See also* DMA Comments at 7-12.

aggressively. The commenters opposing the national do-not-call list also argue that it would violate the First Amendment.[8]

Parties in this proceeding have filed extensive comments refuting these arguments.[9] For example, commenters assert that a national do-not-call list is necessary because the current federal regulatory regime does not adequately protect consumers and that a national list is needed to replace multiple state lists. In addition, although commenters support aggressive enforcement of the lists, they do not believe that additional enforcement is sufficient.[10] Commenters also rebutted the claims that the national do-not-call list violates the First Amendment.[11]

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[8] *See, e.g.*, American Teleservices Association Comments at 57; DMA Comments at 37-39.

[9] *See, e.g.,* New York State Consumer Protection Board Comments at 2-3 (consumers complain that company-specific rules do not protect them from callers do not record their do-not-call request); Center for Democracy and Technology Comments at 1 (there is a growing consumer demand to limit the ability of telemarketers to contact them at home; Verizon Comments at 6 (national do-not-call list is needed to replace the multiple state lists).

[10] *See generally* The Electronic Privacy Information Center Comments at 14 (supporting aggressive enforcement of the telemarketing laws and the national do-not-call list); Attorneys General Comments at 20 (supporting aggressive enforcement of the telemarketing laws and the national do-not-call list).

[11] Comments rebutting claim that national do-not-call list violates the first amendment include: Attorneys General Comments at 5-9 (citing to *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970) to establish that government may regulate commercial speech to help consumers filter speech coming into the home); The Electronic Privacy Information Center Comments at 5-9 (satisfies *Central Hudson* test and does not run afoul of first amendment); New York State Consumer Protection Board at 3-7, 4 (state action to " protect the peace and tranquility of consumers' homes *at their request*" is a constitutional restraint on commercial speech). *See* FTC Statement of Basis and Purpose at 8.

Moreover, of the nearly six thousand comments filed in this proceeding, the vast majority were from consumers directly asking the Commission to implement a national do-not-call list to protect them from unwanted sales calls. This groundswell of support for a Commission-sponsored national do-not-call list provides compelling evidence that consumers are receiving unwanted calls and believe that the current telemarketing laws and state do-not-call lists do not afford sufficient protection.

The FTC also considered[12] and ultimately rejected[13] the majority of the arguments against a national do-not-call list in its recent order. The FTC arrived at its decision to create a national do-not-call list after conducting two public fora in 2000, soliciting public comment on its proposed rule changes in January 2002 and conducting another two-day public forum on the proposed do-not-call registry in June 2002.[14] The FTC received 64,000 comments in its rulemaking proceeding and it found that individual commenters overwhelmingly favored the national do-not-call registry as a means of protecting themselves from unwanted telemarketing calls.[15] After examination of the extensive record developed in its proceeding, the FTC concluded that a centralized do-not-call registry would "provide a mechanism that a consumer

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[12] Opponents to national do-not-call registry argued before the FTC that it would "impose an unconstitutional restriction on commercial speech," that an "FTC registry was not necessary because the current system was sufficient to protect consumer privacy," and that there should be "increased enforcement of existing federal and state do-not-call laws." FTC Statement of Basis and Purpose at 134.

[13] The FTC rejected these arguments, stating that: (1) the extensive record and the 64,000 comments filed in the proceeding adequately make the case that a national do-not-call list is necessary because the current set of state and federal lists and laws do not sufficiently protect consumers against unwanted calls; (2) the national do-not-call registry, because it exempts charitable solicitation, is narrowly tailored to stop unwanted sales calls; and (3) greater enforcement of existing rules would be inadequate. FTC Statement of Basis and Purpose at 139.

[14] FTC Statement of Basis and Purpose at 8.

[15] *See* FTC Statement of Basis and Purpose at 137.

may use to indicate that he or she finds unsolicited telemarketing calls abusive and an invasion of privacy" and also "protect a consumer from repeated abusive calls from a seller or telemarketer."[16]

Although the FTC's do-not-call mechanism will do much to protect consumers, its rules will not cover all telemarketing activity because of the FTC's jurisdictional limitations.[17] AWS urges the Commission to bridge these "gaps" in coverage and create a national do-not-call list in conjunction with the FTC. Without such a coordinated effort there would be considerable confusion on the part of consumers and telemarketers alike as to their rights and obligations.

B. A NATIONAL DO-NOT-CALL LIST MUST PREEMPT STATE LISTS

In order to provide the benefits of a national call list, the Commission can and should use its jurisdiction under the TCPA to preempt state lists. Maintenance of separate state lists with different requirements will confuse customers, increase costs and burdens for telemarketers and decrease the likelihood of effective compliance.

1. Commenters Support the Preemption of State Lists Because it Would Reduce Consumer Confusion, Increase the Likelihood of Compliance and Facilitate Enforcement

Commenters representing a wide variety of interests advocate the preemption of state lists by the Commission in conjunction with its creation of a national do-not-call list.[18] These commenters cite a number of benefits that will result from such preemption which are discussed

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[16] FTC Statement of Basis and Purpose at 139.

[17] *See* FTC Statement of Basis and Purpose at 22 (the Federal Trade Commission Act excludes from the FTC's jurisdiction telephone companies, financial institutions and non-profit entities).

[18] *See* Comcast Comments at 2 ("Ideally, the national do-not-call registry would preempt the requirements of the approximately twenty-seven states that have adopted individual do-not-call lists, thereby substantially lessening the costs and reducing the complexity of complying with these laws"). *See also* Nextel Comments at 4; Cendant Comments at 2; Verizon Comments

below. Indeed, many of the commenters opposed to a national do-not-call list in the first instance would support such a list if the Commission simultaneously would preempt the various state lists.[19]

The establishment of a single national list available to wireline and wireless subscribers and one clear set of standards for all telemarketers to follow would make it significantly easier for consumers to exercise their preferences and for businesses to respect those choices.[20] Comcast emphasizes that a uniform set of standards would significantly ease the burdens for telemarketers while simplifying the process for consumers.[21] Nextel agrees, noting that:

> [T]he proliferation of different state and federal do-not-call requirements increases costs and confusion for consumers and companies alike. Consumers have to learn about and comply with the registration requirements and costs for different do-not-call systems, and undoubtedly many consumers will be confused about the coverage of these various systems. For companies struggling to develop marketing solutions in today's challenging economy, the potential of fifty different sets of do-not-call requirements would negate any efficiencies gained from centralized operations.[22]

Similarly, Verizon argues that preemption of state lists will lead to greater efficiencies and goes so far as to state that "the benefits of a national DNC registry would not be realized if state DNC list systems were allowed to coexist with the national system."[23]

AWS shares the belief expressed by these and other commenters that the current cost to industry involved in checking the multiple state lists, as well as the cost and confusion to

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at 8; Verizon Wireless Comments at 5; Center for Democracy and Technology Comments at 1.

[19] *See* DMA Comments at 40; Sprint Comments at 10.

[20] *See* Cendant Comments at 1-2.

[21] *See* Comcast Comments at 11.

[22] Nextel Comments at 5.

[23] Verizon Comments at 7.

consumers and businesses resulting from multiple lists and multiple registration procedures, far outweigh the administrative costs of a national list. Once established, a single, centralized national list will be easier to administer, for telemarketers to comply with and for consumers to use.

Certain state and consumer groups argue against preemption.[24] Many of the arguments made by these parties, however, appear to stem from the mistaken impression that their interests will be harmed by the Commission's preemption of the state lists. For example, the Attorneys General argue that the Commission should not preempt state lists because states must have the right to protect their citizens from violations of state consumer protection laws.[25] However, preemption would in no way effect the states' ability to enforce their telemarketing and consumer protection laws for intrastate calls and certainly would not otherwise impede their ability to protect their citizens. States could continue to enforce their state specific telemarketing laws for do-not-call violations within their jurisdiction. Only, the state-specific laws and regulations regarding the creation and maintenance of the lists would be eliminated.

Certain consumer groups argue that the Commission should preserve state lists because maintaining a greater number of lists will provide greater consumer protection.[26] However, these groups have not and cannot provide support for this contention. A centralized national do-not-call list will provide equal if not greater protection to consumers than multiple state lists. As a number of commenters point out, a single list will provide even stronger protection because it will eliminate confusion, provide uniformity and increase both the likelihood of compliance as

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[24] *See* Attorneys General Comments at 8-10; Ohio PUC Comments at 9; New York Consumer Protection Board Comments at 12; NASUCA Comments at 10-11.

[25] *See* Attorneys General Comments at 9.

[26] *See* NASUCA Comments at 14; Colorado PUC Comments at 3.

well as the effectiveness of enforcement.[27] Finally, preemption of state lists will relieve states of the operational and administrative expenses incurred in maintaining state databases.

2. The Commission Has the Authority to Preempt State Lists

As many commenters recognize, the TCPA by its terms empowers the Commission to preempt the state lists.[28] In the TCPA, Congress expressly reserved for the Commission the authority to create a single national do-not-call database.[29] Specifically TCPA provides that the Commission may "require the establishment of a *single* national database of telephone numbers of subscribers who object to receiving telephone solicitations…."[30] The TCPA expressly contemplates that the states will use the national data-base in enforcing their state laws. In fact the TCPA directs the Commission to design the single national database "to enable States to use the database mechanism selected by the Commission for the purposes of administering or enforcing State law."[31] Once the national list is created, states are prohibited from establishing a do-not-call program that does not incorporate the names from the federal list.[32] The language in Section 227(c)(3) is so unequivocal that several commenters in the FTC proceeding looked to the statute as support for the position that only the Commission (and not the FTC) can adopt a national do-not-call list.[33]

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[27] *See* Comcast Comments at 2-3; Nextel Comments at 5.

[28] *See* Comcast Comments at 10; DMA Comments at 40; Nextel Comments at 4-5.

[29] *Id.*

[30] 47 USC § 227(c)(3) (emphasis added).

[31] 47 USC § 227(c)(3)(J).

[32] 47 USC §227(e)(2).

[33] *See* FTC Statement of Basis and Purpose at 157 (citing commenters). *See also Mainstream Marketing Services, Inc. v. FTC*, Complaint for Declaratory and Injunctive Relief, United States District Court of Colorado (January 29, 2003) (plaintiffs argue Congress empowered the FCC not the FTC to implement a do-not-call list).

AWS readily acknowledges that the TCPA allows states to create and maintain more restrictive "substantive requirements" governing telephone solicitations.[34] Indeed, Congress explicitly lists those "substantive requirements" in the statute. However, maintaining a state do-not-call database is not among them and may not be read into the language of the statute.

Although a number of state commenters assert that the Commission does not have authority to preempt state lists, they provide little if any support for their assertions. For example, the Attorneys General allege that preemption of state lists would infringe upon matters of state sovereignty but fail to provide any meaningful analysis to support this argument.[35] The Ohio Public Utility Commission cites to the fact that the TCPA allows the states to "impose[] more restrictive intrastate requirements" on telemarketers in support of their assertion that state law should not be preempted.[36] However, as noted above, the authority to adopt more restrictive substantive requirements is not the same as authority to establish a separate list. Finally, the New York Board of Consumer Protection requests that the Commission not preempt state lists because Congress "limits the reach of federal requirements to the use of federal data in state lists." On the contrary, Congress explicitly authorizes the Commission to "select" the database mechanism for a "single" national database.[37]

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[34] AWS does not argue that the Commission has the authority to preempt "more restrictive" state substantive requirements such as those governing the (1) use of fax machines; (2) use of automatic telephone dialing systems; (3) use of artificial or prerecorded voice messages; or (4) making of telephone solicitations. *See* 47 U.S.C. §227(e)(1).

[35] *See* Attorneys General Comments at 8-9.

[36] *See* Ohio Public Utility Commission Comment at 7.

[37] 47 U.S.C. §227(c)(3)(j).

Significantly, although the FTC "specifically reserve[d] further action on the issue of preemption," the FTC emphasized that its objective is one centralized list and a coherent, single set of rules:

> [T]he Commission's intent is to work with those states that have enacted "do-not-call" registry laws, as well as with the FCC, to articulate requirements and procedures during what it anticipates will be a relatively short transition period leading to *one harmonized "do-not-call" registry system and a single set of compliance obligations*. The Commission is actively consulting with the individual states to coordinate implementation of the national registry to minimize duplication and maximize efficiency for consumers and business. The Commission's goal is a consistent, efficient system whereby consumers, in a single transaction, can register their requests not to receive calls to solicit sales of goods or services, and sellers and telemarketers can obtain a single list to ensure that in placing calls they do not contravene those consumers' requests. In adopting the "do-not-call" provisions in the amended Rule, the Commission intends to advance that goal.[38] (Emphasis added.)

3. In Any Case, the Commission Must Ensure Creation of a Single List and Issue a Further Notice to Harmonize the Various Lists

Even if the Commission does not exercise its authority to preempt state lists in this proceeding, at a minimum and consistent with the FTC's objective, it should ensure the creation of a single, all-inclusive list which would incorporate state lists directly into the national list. It further must ensure that telemarketers only have to scrub against this single list and it must coordinate compliance with and enforcement of federal and state telemarketing laws. A large number of commenters stressed how critical it is to have one list and a single set of compliance obligations.[39] For example, Cendant states that it encourages " the FCC to

[38] FTC Statement of Basis and Purpose at 158-9.

[39] *See* Comcast Comments at 2; Nextel Comments at 4; Cendant Comments at 1-2; Verizon Comments at 8; Verizon Wireless Comments at 5; Center for Democracy and Technology Comments at 1.

take steps to minimize the burden of complying with numerous, potentially conflicting obligations. Along these lines, we urge the Commission to incorporate names already found on any existing state lists established by state legislation/regulation into the FTC [sic] list."[40] Similarly, Intrado urges the incorporation of state lists into the national registry in order to "provide a single database for all telemarketing firms that would allow consumers to choose in advance whether they want to be contacted"[41] and NASUCA emphasizes the need for integration of information on the state and federal lists "to ensure that the federal database is as comprehensive as possible."[42]

Commenters emphasizing the importance of a single list even include some states and other commenters opposed to preemption. For example, the Texas PUC states that the national do-not-call registry should operate in conjunction with existing state do-not-call programs.[43] The City of Chicago concurs and emphasizes the importance of a single list and the "one-stop registration process":

> There is clearly a consumer demand for a method of simultaneous registration on many do-not-call lists or a single comprehensive list. Making that registration process easier for the consumer by a "one-stop" registration process – a process within the Commission's exclusive capability to implement – can simultaneously relieve consumers of unnecessary burdens, unwanted solicitations and fraudulent schemes built on the Commission's inaction.[44]

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[40] Cendant Comments at 2.

[41] Intrado Comments at 5.

[42] NASUCA Comments at 15.

[43] *See* Texas PUC Comments at 5-6.

[44] City of Chicago Comments at 5.

As commenters recognize, the single list must not only incorporate all the state lists, but also must be coordinated with the FTC list.[45] Dual Commission and FTC lists would result in the same basic inefficiencies that would result from maintenance of multiple state lists. Moreover, the TCPA authorizes the creation of a single national list,[46] not dual lists maintained by two separate federal agencies.

As discussed below in Section VII, it is necessary for the Commission to solicit further comment on how to meld the multiple databases and registries. Neither the FTC in its recent order nor the Commission in its NPRM provided a road map or a concrete idea as to how the lists will be "harmonized." No commenter has offered a specific proposal as to how this difficult task will be accomplished. It would strain the bounds of the Commission's administrative authority to conclude a rulemaking proceeding with such far reaching consequences without receiving additional comment on this critical issue.[47] AWS urges the Commission, jointly with the FTC, to initiate a further rulemaking proceeding to identify the issues in creating one centralized national list and develop an appropriate regulatory approach to achieve this goal.

III. ADMINISTRATION OF A NATIONAL DO-NOT-CALL LIST

In opening comments, AWS discussed a number of features that it believes are critical to the proper administration of the national do-not-call list, including the continued need for company-specific lists and for a streamlined process for consumers to affirmatively elect to receive telemarketing solicitations from designated companies. In this section, AWS comments on these two features as well as on two particular aspects of the FTC rules.

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[45] *See* Comcast Comments at 8; Texas PUC Comments at 5; Ohio PUC Comments at 11.

[46] 47 USC § 227(c)(3).

[47] *See Florida Light & Power v. United States*, 846 F.2d 765, 771 (DC Cir. 1988) (". . . notice must not only give adequate time for comments, but also must provide sufficient factual

A. Retention of Company-Specific Lists

AWS' position that company-specific do-not-call lists should be retained if a national do-not-call list is established is almost universally supported by commenters.[48] Even those few commenters who express opposition to retaining company-specific lists do so only mildly.[49] Maintaining company-specific do-not-call list gives customers another way to tailor the information they receive from telemarketers. For example, both NASUCA and Verizon argue that company-specific do-not-call lists should be maintained even if the Commission adopts a national do-not-call list because company-specific do-not-call lists benefit the consumer by giving them an additional way to specify what information they would like to receive.[50] Maintaining company-specific lists also would be consistent with the FTC's telemarketing rules.[51]

B. The FTC's Requirement That Companies Need "Express Written Agreement" before Calling a Consumer on the Do-Not-Call List Is Too Restrictive

In its initial comments AWS emphasized the importance of making it easy for consumers to elect to receive telemarketing from specific companies or classes of companies.[52] Consumers

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detail and rationale for the rule to permit interested parties to comment meaningfully.").

[48] *See, e.g.*, Verizon Comments at 3-5; WorldCom Comments at 37-40; National Association of Attorney Generals Comments at 21; NASUCA Comments at 15-16; PUC of Ohio Comments at 13-14; and DMA Comments at 46.

[49] *See* Nextel Comments at 7 (noting that company-specific lists may be unnecessary if a national do-not-call list is adopted and arguing at a minimum that no new requirements should be added for company-specific lists).

[50] *See, e.g.*, NASUCA Comments at 16 and Verizon Comments at 3-5.

[51] *See* FTC TRS Rule § 310.4(1)(iii)(A). *See also* FTC Statement of Basis and Purpose at 147 (maintaining the company-specific do-not-call list rules largely would be consistent with the rules of the states and the Commission).

[52] *See* AWS Comments at 4, 9-11.

who have placed themselves on the national do-not-call list should be permitted to agree to accept telemarketing calls from or on behalf of specific sellers, certain categories of businesses or even about select offers.[53] Other commenters agree with AWS.[54] For example, Cendant commented that it supports the FTC's attempt to allow consumers to fine-tune their preferences by specifying companies from which they would accept calls, even if on the do-not-call list.[55]

An election process is a critical component of the do-not-call rules. It is needed not only to give consumers more ways to tailor the information they receive but to address the potential problem of over-inclusiveness. In order for the election process to solve these important purposes, however, it must be sufficiently flexible and easy to use. The FTC's election process does not meet these criteria.

In its opening comments, AWS expressed significant concern with the FTC's proposal that companies obtain authorization either through an express written agreement or a recorded verbal authorization from a certain telephone. The rule the FTC ultimately adopted is more restrictive than its proposal. Under the FTC's rule the only way the carrier can obtain consent is through a signed written agreement; the option for verbal consent was eliminated. The FTC's rule is entirely too restrictive.

Limiting the form of authorization to signed writings would place an undue burden on both consumers and companies. Requiring consumers to print out, execute, and send a written authorization before receiving calls from a seller is burdensome. At a minimum, it would significantly delay the receipt of the desired information; it may even discourage consumers

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[53] *Id*. at 9-11.

[54] *See* Verizon Comments at 3-4; Cingular Comments at 10; Sprint Comments at 15-17; Cendant Comments at V; Intrado Comments at 6.

[55] *See* Cendant Comments at V.

from electing to receive any telemarketing.[56] Having to implement a signed written authorization process would also be costly and administratively burdensome for companies. The FTC's reliance on a "signed writing" also fails to recognize the technological advances are frequent and that companies continually seek new ways to conduct business. Many companies today are trying to move away from paper transactions with their customers and rely instead on various forms of electronic communication.

AWS proposes that consumers on the national do-not-call list should be able to elect to receiving telemarketing in a variety of ways, including by e-mail, text messaging, telephone, standard mail, or fax. Allowing for a number of authorization options would offer the greatest flexibility to meet changing business needs and technologies. It would also better accommodate consumer preferences.

C. AWS Supports the FTC Rules Regarding the Interaction Between Established Business Relationships and Do-Not-Call Lists

A substantial number of commenters, including AWS, emphasized that it is critical that companies be afforded substantial latitude to communicate with their customers.[57] Many of the carrier commenters agreed that business should be able to contact their own customers even if the customers are registered on the national do-not-call list.[58] The New York Board of Consumer Protection also expressed its support for allowing companies to call its customers who are listed on the do-not-call list, stating as an example the New York do-not-call list law that

[56] *Id.* at 142.

[57] *See* AWS Comments at 10-11.

[58] *See* BellSouth Comments at 5 (national do-not-call requirement should not mean that it cannot call customers); Cingular Comments at 10 (Commission should clarify that do-no-call requirement would not prevent companies from calling customers); Nextel Comments at 13-16.

allows an exemption for "established business relationships."[59] After careful consideration of the issue, the FTC established a rule to expressly allow a company that has an "established business relationship" with a consumer to call a person who is listed on the national do-not-call registry, unless the person has requested that the company place him on its company-specific do-not-call list. In adopting this exception the FTC found "the benefits of including an exemption for established business relationships outweigh costs."[60] AWS urges the Commission to adopt the "established business relationship" exemption adopted by the FTC.

Commenters cite a number of policy reasons that support maintaining a broad and flexible established business relationship exemption like the one adopted by the FTC. First an established business relationship exemption recognizes that by making contact with a company a consumer has expressed willingness to communicate with that company, which is not necessarily the case for a company with whom the consumer has no contacts.[61] Further, consumers are much less likely to feel that a call from a company with whom they have done business is intrusive.[62] In addition, customers may expect to receive information from companies with whom they have an established business relationship.[63] Commenters emphasized that in these circumstances a generic request by a customer to be added to a national do-not-call list should not take precedence over an established business relationship with a specific company.

In addition, adoption of the FTC rule would help clear up ambiguity in the Commission's rules and decisions regarding the interrelationship between established business relationships and

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[59] New York Board of Consumer Protection Comments at 7-8.

[60] FTC Statement of Basis and Purpose at 147.

[61] *See* Nextel Comments at 11-12; Verizon Comments at 12.

[62] *See* Nextel Comments at 12.

[63] *See* Sprint Comments at 16.

do-not-call lists. The Commission's existing telemarketing rules do not require companies to honor do-not-call requests from consumers with whom they have established business relationships.[64] Instead, the rules follow the statute and exempt from the definition of "telephone solicitation" calls to persons with whom the caller has an established business relationship.[65] However, the Commission's NPRM cites to an earlier Commission decision which provided that "a business may *not* make telephone solicitations to an existing or former customer who has asked to be placed on that company's do-not-call list."[66] The FTC's rule resolves this ambiguity and achieves a reasonable balance between the existing business relationship and a customer's do-not-call list requests.

AWS also favors the FTC's definition of established business relationship over the Commission's definition. The FTC defines established business relationship as "a relationship between a seller and a consumer based on:

> (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or
>
> (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call."[67]

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[64] *See* 47 C.F.R. § 64.1200(a)(e)(2)(iii).

[65] *See* 47 C.F.R. § 64.1200(e)(iii), where the definition of "telephone solicitation" excludes calls to established business relationship customers, and therefore does not require those customers to be placed on the company's company-specific do-not-call list.

[66] NPRM at ¶ 35, p. 22 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8770, n. 63 (1992) ("TCPA Order") (emphasis added).

[67] *See* § 310.2(n)(1)-(2).

This definition addresses AWS' concerns that under the Commission's current rules an established business relationship must be formed by "voluntary two way communications," and the established business relationship continue for a reasonable amount of time after the business relationship expires.[68]

D. AWS Supports a 3-Year, Not a 5-Year, Do-Not-Call List Registration

The Commission currently requires companies to maintain names on company-specific lists for 10-years. The FTC recently issued a rule that provides that consumer registration will be valid for five years.[69] AWS supports a shorter duration of 3-years before a person would have to renew their registration on the national do-not-call and company-specific lists. Commenters – even a number of government commenters – agreed that three years would be a suitable amount of time before a person would have to renew their do-not-call preference.[70] A number of commenters proposed an even shorter registration validity period.[71] In supporting shorter time periods commenters noted that requiring periodic renewals of registration would increase the accuracy of the list given how frequently consumers move and change their numbers.[72] Also, a

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[68] *See* AWS Comments at 25.

[69] *See* FTC Statement of Basis and Purpose at 163.

[70] *See* Verizon Comments at 6; Verizon Wireless Comments at 7; Qwest Services Corporation Comments at 4; New York State Consumer Protection Board Comments at 2.

[71] *See* American Teleservices Association Comments at 97-100 (two years); Verizon Comments at 6 (two to three years).

[72] *See* Verizon Comments at 6 (noting that most DNC states impose a requirement of two to three years, which correlates with the amount of churn of telephone numbers). If wireless numbers are added to the do-not-call list, the frequency of number changes will further increase. Most carriers report churn rates between 1.5 percent and 3 percent per month; at current rates, more than 30 percent of subscribers change service providers each year. *In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 17 FCC Rcd. 12,985, FCC 02-179 (2002), at 22.

three-year time period for a do-not-call designation is reasonable given the type of blanket do-not-call provisions envisioned by the national list.[73]

IV. TELEMARKETING TO WIRELESS SUBSCRIBERS

As AWS stated in its opening comments, it does not receive a significant number of complaints from its wireless customers about telemarketing calls to their wireless phones today. Other wireless carriers reported similar experiences with their customers.[74] As wireless consumers rely more on their wireless phones and distribute their wireless numbers more broadly, it is likely that telemarketing to wireless phones will increase – especially as it becomes more difficult for telemarketers and others to distinguish between wireless and wireline phones.[75] In addition, it appears from comments filed in this proceeding that telemarketers would like to solicit consumers on their wireless phones. Accordingly, AWS submits that the Commission should shore up its protections for telemarketing to wireless phones by: (i) allowing wireless customers to place their wireless numbers on the do-not-call list; (ii) clarifying that a wireless customer is, in most cases today, charged for incoming calls and thus entitled to the protections of Section 227(b); and (iii) having a FNPRM addressing how telemarketers should distinguish between wireless and wireline phones in a porting and pooling environment.[76]

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[73] *See* Verizon Comments at 6; Verizon Wireless Comments at 7; Qwest Services Corporation Comments at 4; New York State Consumer Protection Board Comments at 2; American Teleservices Association Comments at 97-100.

[74] *See, e.g.,* Cingular Comments at ii ("CMRS subscribers have largely been immune to calls placed by telemarketers via autodialers and similar devices").

[75] *See* Verizon Comments at 20 (numbering assignments made in blocks of 1000 make it difficult to distinguish wireless from wireline numbers).

[76] AWS disagrees with the Electronic Privacy Information Center that the Commission should apply rules to wireless text messaging. *See* Electronic Privacy Information Center Comments at 13. Not only is this subject beyond the scope of the NPRM, text messaging is akin to electronic mail and the FTC has exempted advertisements sent by electronic mail from its telemarketing requirements in its "direct mail exemption." *See* FTC Statement of Basis and

A. Wireless Subscribers Should Be Allowed to List Themselves on Any Do-Not-Call List Without Being Characterized as "Residential"

As an initial matter, AWS stated in its opening comments that the Commission should allow wireless subscribers to place their numbers on the national do-not-call list. This will allow wireless customers to obtain an additional level of protection from unwanted telemarketing calls. A long list of commenters agree that wireless subscribers should have the option of preventing unwanted calls to their wireless phones.[77] Even commenters who are opposed to the national do-not-call list support providing equal treatment to wireless phones.[78] The FTC's new telemarketing rules specifically permit the inclusion of wireless numbers on the national do-not-call list and provide that the "do-not-call" prohibitions apply to any call placed to a consumer, whether to a residential telephone number or to the consumer's cellular telephone or pager.[79]

Commenters also generally agree that the Commission does not have to and should not classify wireless services as "residential subscribers" for the purposes of applying the restrictions on live telephone solicitations in Section 64.1200 of the Commission's rules.[80] These parties

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Purpose at 214 and FTC TRS Rules § 310.6(b)(6).

[77] *See, e.g.,* BellSouth Comments at 6 (stating that the Commission should have "zero tolerance for telemarketing to wireless phones"); Sprint Comments at 10, n.7 (consumers should be allowed to include all of their assigned numbers on the list); New York State Consumer Protection Board Comments at 10 (recommends that wireless numbers be on the national database); Public Utility Commission of Ohio Comments at 21-2 (wireless subscribers should automatically be placed on the national do-not-call list); Electronic Privacy Information Center Comments at 16 (wireless subscribers should be able to "enroll" on the do-not-call list).

[78] *See, e.g.,* BellSouth Comments at 6 (opposes national do-not-call list but stating that the Commission should have "zero tolerance for telemarketing to wireless phones"); Sprint Comments at 10, n.7 (opposes the national do-not-call list but supports including all assigned numbers, wireless or wireline, on the list).

[79] *See* FTC Statement of Basis and Purpose at 144.

[80] *See* AWS Comments at 30-32.

explain that wireless phones may be classified as neither residential nor business and argue that classifying wireless as residential could lead to unintended consequences.[81]

By contrast, the only comment AWS read in support of characterizing wireless service as residential was from the Public Utility Commission of Ohio ("Ohio PUC").[82] However, the Ohio PUC comments demonstrate the impropriety of trying to classify wireless service as residential, noting that some consumers use wireless for residential and some use wireless for business. Moreover, it appears that the Ohio PUC's purpose in classifying all wireless phones as residential was to ensure that wireless customers were afforded the opportunity to register on the Commission's do-not-call list. As AWS noted in its opening comments,[83] however, and other commenters agreed,[84] the reference in § 227(c)(3) to "residential subscribers" does not prohibit including wireless numbers on a do-not-call list.

B. The Commission Should Clarify That Wireless Customers Are Charged for Incoming Calls and Are Entitled to the Protections of Section 227(b)

In order to increase its flexibility to make telemarketing calls to wireless phones, ATA requests that the Commission "clarify" that the TCPA prohibits only calls to wireless phones where the caller is charged for the incoming call and that calls within a pre-purchased bucket of

[81] *See* Cingular Comments at 6 (stating that classifying wireless as residential could lead to unintended consequences); Direct Marketing Association Comments at 34-5 (not necessary to redefine wireless to be residential); Nextel Comments at 19-23 (stating that primary purpose of the TCPA is to protect consumers from invasions of privacy in their residences, and that wireless phones are not used primarily from the residence); Verizon Comments at 19 (no basis for treating wireless numbers as "residential" and would have no basis for "treating wireless numbers as not residential"); Verizon Wireless Comments at 9-10 (do not consider wireless residential because consumers "use their wireless phones virtually everywhere").

[82] *See* Public Utility Commission of Ohio Comments at 11.

[83] *See* AWS Comments at 31-32.

[84] *See* Cingular Comments at 6 (opposed the national do-not-call list but supports a rule that would allow both residential and wireless subscribers to sign up on company-specific lists).

minutes are not "charged for" within the meaning of the TCPA.[85] AWS agrees that the Section 227(b) restriction on calls to wireless phones should only apply when the customer is charged for the call. In this regard, the legislative history indicates that one of the primary concerns of the Congress was to prevent customers from having to pay for unwanted telephone solicitations.[86]

However, AWS disagrees with the ATA that wireless customers are not charged for incoming calls. The ATA argues that because many wireless subscribers now purchase plans that include a "bucket" of minutes similar to the pricing of local wireline phone service, it cannot be said that an individual incoming call is charged to the called party.[87] The ATA is mistaken in this regard for several reasons. First, the Commission has long recognized wireless customers are charged for incoming calls whether they pay in advance, e.g. for a "bucket" of minutes, or after the minutes are used.[88] More importantly, the ATA ignores a critical difference between the pricing for local wireline service and the pricing for wireless service. The pricing for local wireline service typically is a flat rate for unlimited incoming minutes and unlimited local outgoing minutes. In contrast, wireless plans typically have limited minutes that can be used for incoming or outgoing calls. Thus for local wireline service a customer would never have to pay more for phone service as a result of receiving telemarketing calls. This is not the case with

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[85] *See* ATA Comments at 126-27.

[86] *See* H.R. Rep. No. 102-317 (1991).

[87] *See* ATA Comments at 127.

[88] *In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 17 FCC Rcd. 12,985, FCC 02-179 (2002), at 29, 50 (recognizing that "all of the nationwide operators offer a similar type of . . . pricing plan that allows customers to purchase a bucket of MOUs on a nationwide or nearly nationwide network" and that "mobile subscribers in the United States . . . typically pay both to make and receive calls").

wireless customers; even a few telemarketing calls could cause them to have to pay more for their service, if the customers are typically near the limit of their plan's "bucket."

Moreover, ATA's proposal that allows automatic dialing equipment to call wireless "bucket" plan subscribers is unworkable. As discussed below, it is going to be difficult enough for telemarketers to distinguish between wireless and wireline phone numbers. But it will likely be impossible for telemarketers to distinguish between wireless phone numbers that are charged based on a "bucket" plan and those that are charged on a per-minute basis. Thus telemarketers would have no way to identify only "bucket" plan subscribers.

C. The Commission Should Have a FNPRM Addressing How Telemarketers Should Distinguish between Wireless and Wireline Phones in a Porting and Pooling Environment

Commenters agree on the difficulty in distinguishing wireless from wireline numbers with the advent of wireless participation in number pooling and porting. Nevertheless, no one has offered a compelling solution to the prospective problem. For example, Verizon states that "wireless portability will make it almost impossible to know" whether a number is wireless, and then offers only that a wireless carrier could provide call intercept capabilities to subscribers.[89] The National Consumers League suggests that telemarketers use technology to distinguish between wireless and wireline,[90] and CTIA suggests that telemarketers have access to the Interactive Voice Response system being developed by Public Safety Answering Points to determine whether the number is wireless or wireline.[91] AWS believes that the suggestions on these points are useful but that the Commission needs to lend some structure to the discussion,

[89] Verizon Comments at 20-22; WorldCom Comments at 46 (noting significant issues with portability and distinguishing between wireless and wireline, says it is premature to address the interplay between telemarketing and number portability).

[90] National Consumers League Comments at 7.

and present concrete proposals for consideration. The Commission should seek further comment on this issue in a FNPRM (*see* discussion below at Section VII).

V. THE COMMISSION SHOULD DECIDE THAT CPNI CONSENT TRUMPS STATE OR NATIONAL DO-NOT-CALL LISTS

A number of commenters, including AWS, support the Commission's tentative conclusion that no type of do-not-call request (company-specific, state, or national) revokes or limits a carrier's right to use customer proprietary network information (CPNI) in a manner other than via telemarketing.[92] Further, commenters support AWS' position that a consumer's registration on a company-specific do-not-call list would override any type of CPNI consent.[93] Commenters are divided, however, on how CPNI consent should affect a customer registered on a generic state or national do-not-call list.[94]

After reviewing the comments, AWS is convinced that CPNI consent should trump general state or national do-not-call list designation for several reasons. First, as a basic principle, a CPNI consent is an authorization by the customer to be marketed to by a specific company or companies. It is reasonable to assume (in the absence of a company specific do-not-call request) that the authorization covers a number of forms of marketing, including

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[91] CTIA Comments at 6.

[92] *See, e.g.*, BellSouth Comments at 6; Verizon Comments at 16; and AWS Comments at 21.

[93] *See, e.g.*, Sprint Comments at 17 and Verizon Comments at 16.

[94] *See, e.g.*, Sprint Comments at 16 and Cingular Comments at 10 (CPNI consent trumps national do-not-call list designation); BellSouth Comments at 6 (carrier cannot call to market other services to a customer whose name is on a DNC list even if customer has given CPNI consent); and New York State Consumer Protection Board Comments at 5-7 (type of CPNI consent and time of consent should play role in determining effect of CPNI consent on national do-not-call list designation).

telemarketing.[95] Second, when a customer gives a carrier permission to use his or her CPNI for marketing purposes, the customer is expressing a preference about the speech she wishes to receive from a specific company. Finally, allowing specific CPNI consent to trump a national or state do-not-call list gives consumers greater flexibility and yet another tool to tailor the marketing information received from specific companies, which will help to counterbalance the broad reach of national do-not-call list.

The Commission should request the New York State Consumer Protection Board's proposal that, where a consumer has both affirmatively exercised CPNI consent and registered on a national do-not-call list, the consent or request that was given latest in time should prevail.[96] Although this proposal has some facial appeal, it simply would be unworkable. Adding a time element to the interaction between CPNI consent and do-not-call list status, only complicates carrier compliance and makes it even more difficult to administer these lists.

VI. THE COMMISSION SHOULD INCLUDE REASONABLE MEASURES AGAINST OVERZEALOUS ENFORCEMENT OF THE TCPA RULES

A. The Commission Should Generally Allow for Enforcement under TCPA Rules Only Where More Than One Call That Violates TCPA Is Made to a Consumer

In the NPRM, the Commission noted that it had a "one-call" rule for violation of the automatic dialing/pre-recorded message provision of the Commission's rules and a "two-call rule" for violations of the other Commission telephone solicitation rules, but sought comment on whether to extend one-call rule to other TCPA violations.[97] The Commission should not extend

[95] *See* AWS Comments at 20.

[96] *See* New York State Consumer Protection Board Comments at 6-7.

[97] *See* NPRM ¶ 47.

the "one-call" rule to violations other than the automatic/pre-recorded message provision of its TCPA rules.

While few commenters address this issue, those that do -- including those commenters representing consumer interests -- generally support allowing telemarketers some leeway to comply with the Commission's telemarketing rules. For example, the New York State Consumer Protection Board states that allowing enforcement after more than one telephone call received "provides a margin of error that is reasonable for telemarketers, eases enforcement burdens, and is not overly burdensome to consumers."[98] AWS agrees with the New York State Consumer Protection Board and urges the Commission to clarify that its "two-call" rule applies to all violations of the TCPA to the extent permitted by statute.[99] Allowing for enforcement after more than one call strikes the proper balance between protecting against honest mistakes by telemarketers and allowing enforcement where telemarketers are clearly violating the rules.[100] Punishing telemarketers for a single honest mistake has little deterrent value as these types of mistakes may be difficult to control even with the best policies in place. Also, enforcement after more than one call will be more efficient by targeting telemarketers that repeatedly violate the TCPA.

The Commission also needs to work with the FTC to ensure that the enforcement threshold for national do-not-call list violations is the "more than one call" standard required by

[98] New York State Consumer Protection Board Comments at 19.

[99] In this respect it appears that under Section 227 the FCC may be required to maintain its one-call rule for violations of the autodialer and pre-recorded message provisions of the TCPA. *See* 47 USC §227(b)(1)(A).

[100] Honest mistakes could be made by telemarketers who strive to comply with the TCPA rules. For instance, inputting one digit incorrectly could result in a call be placed to another time zone where the call is outside of the allowed time periods.

the TCPA. Currently, FTC Rule 310.4(b)(1)(iii) appears to allow for initiation of enforcement actions for do-not-call list violations after any call in violation of the national do-not-call list. In the context of do-not-call list enforcement, it is particularly important that the more than one call enforcement standard is applied because of delays in processing the do-not-call requests.[101] In this regard, it is likely that there will be some lag between when a consumer puts his name on the do-not-call list and when that data is actually reflected in telemarketers' databases. If consumers are allowed to bring enforcement actions on the first call, telemarketers may end up having to defend against many baseless suits.

B. The Commission Should Clarify and Develop the Safe Harbor Provision of Section 227(c)(5) in Its TCPA Rules

The TCPA provides that it "shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violations of the regulations provide in this subsection." FTC Rule 310.4(b)(3) goes further and lists specific steps a carrier must take to qualify for a safe harbor. Specifically, FTC Rule 310.4(b)(3) makes it clear that where an entity establishes written procedures, trains its personnel on its written procedures, imports national do-not-call list data every three months, and monitors and enforces compliance with its written procedures, it will not be liable for calls placed to customers on the national do-not-call list. AWS supports the FTC safe harbor rule and recommends that the Commission add a similar rule to its telemarketing regulations. Such a rule would provide clarification to companies about what steps they have to take with respect to their own telemarketing activity or telemarketing by their authorized telemarketers. Similarly, it would

[101] *See* National Consumers League Comments at 7.

provide some guidance and protection to companies whose names are used by unauthorized telemarketers.

In this regard, the Commission should go beyond the FTC rule and clarify what the obligations of a company are with respect to the unauthorized marketing of its service. Specifically in those instances involving third party marketing where the company attests that it did not authorize the solicitation by the third party telemarketer and provides reasonable verification of that fact, the burden should shift to the government entity prosecuting the complaint to prove the company's responsibility. The alternative, which results in requiring a company to "prove the negative," is unreasonable and unduly burdens companies acting in good faith.[102] Only if the government can prove the company's direct and knowing involvement should the company be held liable.

VII. THE COMMISSION MUST HAVE A FURTHER NPRM ON THE UNRESOLVED OPERATIONAL AND IMPLEMENTATION ISSUES IN HAVING ONE NATIONAL DO-NOT-CALL LIST

AWS agrees with those commenters that support a FNPRM to address implementation issues related to the establishment of a single, centralized, national do-not-call list.[103] The Administrative Procedures Act requires that before a federal agency can adopt a rule it must give interested parties notice.[104] The purpose of the notice requirement is to allow parties to make meaningful comment on an agency proposal and to give the agency the information necessary to make well-informed decisions.[105] For notice to be sufficient, it must be reasonably specific;

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[102] *See* AWS Comments at 36.

[103] *See* Qwest Comments at 9-10 (supporting a further NPRM generally); DMA Comments at 49-52 (supporting a further NPRM on implementation issues).

[104] 5 U.S.C. § 553(b)(3).

[105] *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986).

otherwise interested parties will not know what to comment on and the notice will not lead to better informed agency decisions.[106]

In several key areas of the NPRM, the Commission did not make any specific proposals (or even ask detailed, narrowly crafted questions) about how the national do-not-call list would be implemented, including how it would be paid for. Although the Commission has asked for comment on the FTC rules, unfortunately the FTC rules similarly lack specifics on this issue and the FTC has pending a cost proceeding.[107]

More importantly, many issues surrounding the creation of a single, centralized, national do-no-call list remain unresolved. In particular, it will be critical for the Commission to ensure that its rules and policies are appropriately combined with those of the FTC and that a cohesive regulatory approach is developed.[108] For example, although the FTC suggested that it would "harmonize" the state and federal do-not-call lists, it did not say how and it has not yet put that issue out for public comment.[109] Similarly the comments in this proceeding fail to provide details about the implementation of a national call list. Although some of the opening comments in this proceeding suggest approaches that the Commission might take on these key implementation issues, they either lack detail or look at only one aspect of an extremely complicated implementation process. For example, although a number of commenters suggest generally how the state and federal coordination issues might be addressed (preemption, merger,

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[106] Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 705 F2d 506, 549 (DC Cir. 1983).

[107] *See* 67 FR 37362 (May 29, 2002) (NPRM on method for how fees for the use of the national do-not-call registry would be set).

[108] The Commission and the FTC have worked closely together in the past. *See* In the Matter of Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers, Policy Statement, FCC 00-72 (Released March 1, 2000).

etc.),[110] these commenters offer no comprehensive, detailed proposals for how the lists would be created and maintained.

The Commission, in conjunction with the FTC, should issue a further NPRM that proposes more specific measures for addressing these key implementation issues including how the cost of maintaining the list will be recouped. A further notice will allow parties the opportunity to provide direct comment to concrete issues and to give the Commission the material it needs to make a well-reasoned decision on these critical implementation issues.

Finally, on the key issue of how telemarketers will distinguish between wireless and wireline numbers once wireline numbers can be ported to wireless phones, the NPRM only acknowledges the issue, but does not set forth specific proposals for comment. Commenters propose a number of ways that telemarketers could attempt to identify wireless numbers once porting and pooling go into effect, but do not discuss their proposals in detail.[111] The Commission and all the parties would likely benefit from a FNPRM that proposes a specific

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[109] *See* FTC Statement of Basis and Purpose at 158, 166.

[110] *See, e.g.*, Nextel Comments at 4-5; Sprint Comments at 10 (national list preempts state lists); Colorado Public Utilities Commission Comments at 2-3 (allow state to opt-out of national framework); New York State Consumer Protection Board Comments at 14 (State and Federal list exist concurrently and may realize economies of scale through database management coordination); Texas and Ohio PUC Comments (exist separately share data); National Consumers League Comments at 7-8 (FCC, FTC, state coordinate if integrated national do-not-call list is goal); DMA Comments at 46-49 (national list sum of the states with TPS for states without their own list).

[111] *See, e.g.*, CTIA Comments at 5-6 (telemarketers could use DMA Wireless Telephone Suppression Service database, limited access to Interactive Voice Response System, or database being developed by Intrado); Nextel comments at 23-24 (take steps to give telemarketers access to necessary data); Verizon Comments at 21-22 (where customer ports wireline number to wireless phone assume that consent has been given for telemarketing); WorldCom Comments at 55 (request advisory opinion from NANC as to the ability of telemarketers to identify wireless numbers); National Consumers League at 7 (when consumers port landline number to wireless service providers should be required to inform them of do-not-call systems available or develop technology that enables telemarketers to identify wireless phone number).

method for dealing with wireless numbers in the porting and pooling environment, which the Commission would refine based on parties' comments and additional industry consideration of potential technical solutions.

VIII. CONCLUSION

For the foregoing reasons, as well as the reasons stated in AWS' comments, the Commission should coordinate with the FTC and adopt a single national do-not-call registry that will preempt the multiple state do-not-call lists and permit wireless carriers to register on the list. In implementing a national do-not-call registry, the Commission should create rules sufficiently flexible to allow consumers on the do-not-call list to be called by companies with whom they have established business relationships, and from which they were elected to receive calls. The Commission should adopt and extend the FTC's safe harbor provision to allow companies to protect themselves against the unauthorized marketing of service. The Commission should also institute a further rulemaking in coordination with the FTC to resolve a number of outstanding implementation issues.

Respectfully submitted,

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Dated: January 31, 2003

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